IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 778

IN THE MATTER OF SAMUEL W.

v.

FAMILY COURT OF THE STATE OF NEW YORK

*ON APPEAL FROM THE NEW YORK COURT OF APPEALS*

## BRIEF FOR THE NEIGHBORHOOD LEGAL SERVICES PROGRAM OF WASHINGTON, D.C. AND THE LEGAL AID AGENCY FOR THE DISTRICT OF COLUMBIA AS AMICUS CURIAE

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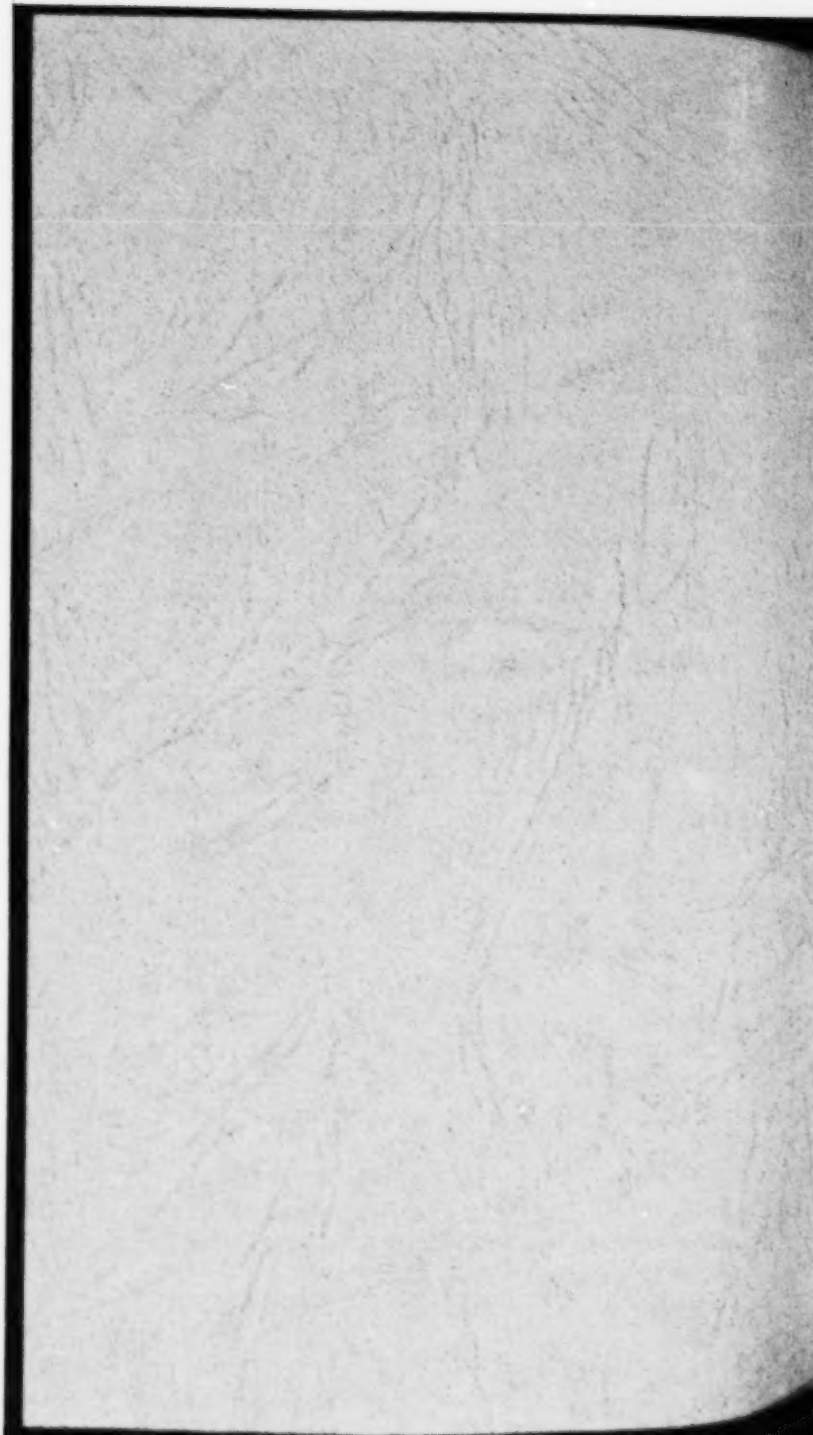

## TABLE OF CONTENTS

## TABLE OF CITATIONS

*Cases:*

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The Neighborhood Legal Services Program of Washington, D.C. and the Legal Aid Agency for the District of Columbia file this brief *Amicus Curiae* pursuant to consent of the parties hereto, submitted herewith.

### INTEREST OF *AMICUS CURIAE*

Neighborhood Legal Services Program (NLSP) of Washington, D.C. is a legal service program funded by the Office of Economic Opportunity. The 10 field offices of this program handle the cases of indigent juveniles in the nation's capitol. They handle several hundred of these cases each year. The burden of proof standard applied by the District of Columbia Juvenile Court in both court and jury trials is "a mere preponderance of the evidence." Several cases handled by NLSP attorneys which argue that the preponderance

standard be changed to "beyond a reasonable doubt" are pending in the United States Court of Appeals for the District of Columbia. Since the vast majority of juveniles who come before the nations' juvenile courts are without funds to pay for legal services, the ruling in this case will have an enormous impact on juvenile proceeding in the District and throughout the country.

The Legal Aid Agency is required by statute to represent youths charged with delinquent conduct in the District of Columbia Juvenile Court. D.C. Code §2-2202 (1967). During fiscal 1969 for example, Agency attorneys appeared in approximately 1500 delinquency cases. The Agency firmly believes that justice in the District of Columbia Juvenile Court would be enhanced if "beyond a reasonable doubt" were the standard of proof to be applied in cases involving determinations of delinquency. Litigation aimed at eliminating the present, civil standard of proof in juvenile cases involving criminal offenses has been pursued in the past by Agency attorneys, and an Agency case in which this issue is presented is currently on appeal before the United States Court of Appeals for the District of Columbia.

## QUESTION PRESENTED

Whether a youth who is charged with committing a criminal offense, the conviction for which may result in a prolonged period of institutional confinement and which, if he were an adult, would constitutionally require proof beyond a reasonable doubt, is deprived of his liberty without due process of law or denied equal protection of the laws when he is convicted of delinquency by a "mere preponderance of evidence?"

## SUMMARY OF ARGUMENT

A youth who is charged with committing a criminal offense, the conviction of which may result in a prolonged period of institutional confinement, and which, if he were an adult would constitutionally require proof beyond a reasonable doubt, is deprived of his liberty without due process of the law and denied equal protection of the laws when he

is convicted of delinquency by a mere preponderance of the evidence.

Beyond a reasonable doubt has always been the standard of proof required for a conviction in an adult criminal proceeding. The reason for the application of this standard is that an individual whose liberty and freedom may be taken away must be presumed innocent until the Government is able to prove, by facts which leave no reasonable doubt in the mind of the factfinder, that he is guilty of the offense with which he has been charged.

A juvenile is deprived of his liberty when he is convicted of committing a criminal offense. A conviction often results in the youth being detained in an institution which is understaffed and ill-equipped, and which fails to provide the juvenile with an effective rehabilitative program. While the great juvenile experiment had not failed, many of the laudatory goals which it sought to achieve have not been attained in fullest measure. Even the stigma attached to a finding of delinquency subjects the convicted youth to a variety of disabilities which juvenile court statutes euphemistically assert do not attend the juvenile's conviction.

Enlightened judicial and legislative opinion, as well as many commentators, recognize the necessity for adoption of the reasonable doubt standard. The very fact that some youths are accidentally afforded the reasonable doubt standard through their discretionary transfer to an adult court by the juvenile court dramatizes the unequal treatment provided those youths who are prevented from realizing a constitutional right, apparently because they are considered "good" enough to warrant the benefits of a proceeding conducted in the juvenile court.

The preponderance standard conflicts with a youth's assertion of his privilege against self-incimination, a privilege extended to juveniles in *Gault*. Few youths would not feel compelled to take the stand on their own behalf in order to contradict the evidence presented by the Government which must only demonstrate the factfinder that its case is "more convincing" than the youth's.

By adopting the reasonable doubt standard the rehabilitative purposes of the juvenile court are in no way jeopardized. Indeed, application of the criminal standard to cases involving youths charged with the commisson of a criminal offense will allow, at the post-adjudicatory stage, convicted juveniles who are in real need of treatment to derive the greatest benefit from the meager resources presently available for rehabilitation; providing a greater chance of saving such youths from returning to society as hardened criminals.

## ARGUMENT

### I.

### THE FAILURE TO AFFORD A YOUTH THE RIGHT TO BE ADJUDICATED A DELINQUENT BY PROOF WHICH LEAVES NO REASONABLE DOUBT THAT HE COMMITTED THE CRIMINAL OFFENSE WITH WHICH HE IS CHARGED IS A DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS AND A DENIAL OF EQUAL PROTECTION OF THE LAWS.

Both the Due Process and Equal Protection Clauses of the Fourteenth Amendment require the application of the criminal standard of proof in juvenile delinquency proceedings. The "criminal" aspects of a juvenile court determination, the stigmatizing effect of a conviction and the characteristic ease with which transfer to an adult court may take place sharply dramatize the need for according juveniles the same standard of proof protection which has long been considered a constitutional safeguard for adults.

The deprivation of a child's liberty as a result of a conviction of a criminal offense is so severe that there no longer appears to be any justification for denying the application of the higher standard. Indeed, the poor institutional rehabilitation that juveniles generally receive makes it more imperative that a youth be accorded at least the same protection given an adult when the youth is charged with acts the conviction of which may result in his prolonged, and often-

times repressive, incarceration. In considering the necessity for the application of the adult standard of proof in criminal cases, one is reminded of Mr. Chief Justice Warren's assertion in 1964 that:

> "After all, what we are striving for is not merely 'equal' justice for juveniles. They deserve much more than being afforded only the privileges and protections being afforded their elders. A niggardly and indiscriminate granting of concepts of justice applied to adults will stunt the growth of the juvenile court and handicap the progress of future generations."[1]

**A. An Individual Convicted Of Committing A Criminal Offense Is Deprived Of His Liberty Without Due Process Of Law Unless The Case Against Him Is Proved Beyond A Reasonable Doubt.**

It is true that the requirement that a man be proved guilty beyond a reasonable doubt finds no explicit constitutional expression. Nevertheless, it has long been regarded as an essential ingredient and one of the fundamental principles of American jurisprudence that an individual's liberty may not be deprived without proof beyond a reasonable doubt. As McCormick has noted:

> "This demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, but its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." McCormick, *Evidence* § 321 (1954).[2]

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[1] Address by Mr. Chief Justice Warren, The National Council of Juvenile Court Judges, Vol. 15, No. 3, Juv. Ct. Judges J. 14, 16 (1964).

[2] McCormick cites as authority for this statement, Thayer, *Preliminary Treatise on Evidence* 558-9 (1898), which in turn quoted passages from Coke's 3rd Institute. The first articulation of the standard came in the high treason cases of 1798 in Dublin as reported by McNally, *Rules of Evidence on Pleas of the Crown* (1802).

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At a very early point in our nation's judicial history we see an unequivocal acceptance of "beyond a reasonable doubt" as the applicable standard of proof in criminal prosecutions. So universal has been its acceptance that not a single case can be found in the law books rejecting that standard.

Several decisions of this Court in the nineteenth century have applied and interpreted the reasonable doubt standard in both federal and state criminal cases. For example, in *Miles v. United States*, 103 U.S. 304 (1880), a federal prosecution for bigamy, this Court said, at 312:

> "The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt."[3]

More recently, in *Brinegar v. United States*, 338 U.S. 160 (1949), this Court indicated:

> "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common law tradition to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. 338 U.S. at 174."[4]

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*See also* May, *Reasonable Doubt in Civil and Criminal Cases*, 10 Am. L. Rev. 642, 656-7 (1876).

[3]*See* Hopt v. Utah, 120 U.S. 430, 439-42 (1887); Dunbar v. United States, 156 U.S. 185, 198-9 (1895); Coffin v. United States, 156 U.S. 432, 460 (1895); Davis v. United States, 160 U.S. 469, 493 (1895); Agnew v. United States, 165 U.S. 36, 51-2 (1897); Holt v. United States, 218 U.S. 245 (1910), as well as the state court cases cited in *Hopt* which applied the reasonable doubt standard. *See also* State v. Santana, 444 S.W. 2d 614, 626-27 (Tex. 1969).

[4]Even in the subsequent case of Leland v. Oregon, 343 U.S. 790, *reh. denied*, 344 U.S. 848 (1952), where the Court found it constitutionally permissible for a state to shift the burden of proof to the defendant on an insanity defense, the Court reiterated that the overall

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And in *Speiser v. Randall*, 357 U.S. 513, 525-26, *reh. denied*, 358 U.S. 860 (1958), this Court said again:

> "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208; *United States v. New York, N.H.& H.R. Co.* 355 U.S. 253; *Sampson v. Channell*, 110 F.2d 754, 758. There is always in litigation a margin of error, representing error in factfinding which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden or producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt."[5]

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burden of proving guilt beyond a reasonable doubt lay on the prosecution. 343 U.S. at 799. Frankfurter, J., dissenting in that case said:

> "... From the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of the jurors. It is the duty of the Government to establish guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic procedural content of 'due process'. 343 U.S. at 802-03.

[5] *Accord*, Lilienthal v. United States, 97 U.S. 237 (1878); Leland v. Oregon, 343 U.S. 790, dissenting opinion of Frankfurter and Black, *reh. denied*, 344 U.S. 848 (1952); Brooks v. United States, 164 F.2d 142 (5th Cir. 1947); Shaw v. United States, 174 Ct. Cl. 899, 357 F.2d 949 (1966); Government of Virgin Islands v. Torres, 161 F.Supp. 699 (D.V.I. 1958); People v. Licovoli, 250 N.W. 520 (Mich. 1933); People *ex rel* Schubert v. Pinder, 9 N.Y.S.2d 311 (Sup. Ct. 1938); State v. Dantonio, 115 A.2d 35 (N.J. 1955). *See also In re*

(Continued)

It should be remembered that, during the period when the reasonable doubt standard was first articulated by the Courts, children over the age of seven were tried and treated as adults. They, too, were the recipients of this fundamental procedural safeguard.[6]

In sum, the reasonable doubt standard, while it had not yet been definitely articulated at the founding of our nation, evolved gradually into a universally-accepted element of common law criminal due process. This is reflected in many opinions of this Court. The history of criminal procedure in our country discloses no territroy, state, or federal court that has even attempted to change that standard, since it is so embedded in our notions of criminal due process.

The real question, therefore, is whether a conviction[7] of an offense in a juvenile proceeding can be considered "crim-

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M, 450 P.2d 296, 801 (Cal. 1969); State v. Arenas, 453 P.2d 915, 917 (Ore. 1969) (*en banc*). Both cases refused to extend the reasonable doubt standard to juvenile delinquency adjudications. *See* pp. 21-25, *infra*. Nonetheless, each recognized that an adult's right to be found guilty by the higher standard is a right which is inherent in the Due Process Clause of both the federal and its own state constitutions. *See also* 2 Inbau, Thompson & Sowle, *Cases and Comments on Criminal Justice* 1145 (3rd ed. 1968): "An indispensable element of 'due process' is the requirement that guilt be proved 'beyond a reasonable doubt.'"

[6]But there is no trace of the doctrine of parens patriae in the history of criminal jurisprudence. At common law, children under seven were incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial and in theory to punishment like adult offenders. In these old days, the state was not deemed to have authority to accord them fewer procedural rights than adults." *In re* Gault, 387 U.S. 1, 16 (1967).

[7]It is true that in the instant case the Court of Appeals insisted that the proceedings were not criminal because, even if the juvenile is incarcerated, the relevant statutory provision asserts that his adjudication is technically not a "conviction" and affects no right or pri-

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inal" in the traditional sense that a youth loses his liberty. To be sure, it was never intended that a determination of delinquency in a juvenile proceeding would ever assume the characteristics of a criminal adjudication. In fact, after the emergence of the doctrine of "parens patrise,"[8] and until the profound changes wrought in juvenile cases by the decision in *In re Gault*, 387 U.S. 1 (1967) most courts accepted without question the assumption that juvenile proceedings were civil, not criminal. They were concerned solely with promoting the child's rehabilitation, not punishing his criminality. Indeed, the intention in creating juvenile courts was laudatory: to remove all taint of criminality from the child's unlawful activity. An adjudication of delinquency was never supposed to restrict the beneficial processes used to prevent a youth from "copping out" of society, nor from losing faith that his elders were giving him a fair shake at readjusting to it. It followed that the customary constitutional safeguards were unnecessary for and inappropriate to determining the best interests of the child.[9]

But insofar as the assumptions upon which this paternalistic view rest are unfounded, and insofar as procedures preserving the essential fairness of a juvenile proceeding are not inconsistent with the goals of the juvenile court, the youth should and must be accorded constitutional safeguards. It is therefore necessary to examine these assumptions.

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vilege. This type of provision is typical. *But see, e.g.*, D.C. Code § 3-120 (1967), which seems to implicitly recognize that a hearing on delinquency is in the nature of a criminal proceeding. *See also* Uniform Juvenile Court Act § 2(2)(1968) and text accompanying notes 17-18, 32, *infra*.

[8]State v. Dunn, 99 P. 278, 280 (Ore. 1909).

[9]*See, e.g.*, People v. Lewis, 183 N.E. 353, 355 (N.Y. 1932); *In re* Bigesby, 202 A.2d 785-786 (D.C.Ct.App. 1964); *In re* McDonald, 153 A.2d 651 (D.C.Ct.App. 1959).

**B. A Convicted Juvenile Delinquent Is Deprived Of His Liberty In The Same Manner, And With The Same Consequences, As An Adult Criminal.**

One basic reason for not providing "criminal" safeguards in juvenile proceedings has been that any resulting confinement is directed to rehabilitation, not punishment. The approach taken by the District of Columbia Courts is indicative of the traditional view. For example, in *In re Elmore*, 222 A.2d 255 (D.C. Ct. App. 1966), *modified*, 382 F.2d 125 (D.C. Cir. 1967), in which a 13 year old child was found to be delinquent, the District of Columbia Court of Appeals euphemistically asserted that:

> "A delinquent child is neither considered nor treated as a criminal but as a person needing guidance, care, and protection. The safeguards which surround him do not inherently derive from the Constitution but from the social welfare philosophy which forms the historical background of the Juvenile Court Act . . . [t]he investigation and court proceedings involving the determination of a child's delinquency are directed to the status and needs of the child, and the disposition thereof has as its goal not punishment but the rehabilitation and restoration of the child to useful citizenship. The end result is that a child should not be labeled a criminal, he is not punished as a criminal, and the proceedings against him should be far removed from the characteristics of criminal trial" 222 A.2d at 257-8.[10]

The premise that juvenile confinement is rehabilitative, versus punitive, in nature needs reexamination. For, not only is most criminal confinement also directed, at least in part, toward rehabilitation,[11] but also there is reason to question

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[10]It should be pointed out, however, that in this case the court was not dealing with a boy who had committed any specific antisocial offense, but rather with one whose "habitual" course of conduct placed him beyond the control of his mother.

[11]*See, e.g.*, State v. Arenas, 453 P.2d 915, 918 (Ore. 1969) (*en banc*). Although the court refused to require the adoption of the adult standard of proof to determinations of delinquency, it noted:

[continued]

whether the confinement of youths has the desired rehabilitative effect. There is competent evidence to suggest that the original objectives of the juvenile court system have not been effectively accomplished.[12] Institutions which house convicted delinquents often fail to provide an adequate form of treatment for the youths.[13] In fact, in *Kent v.*

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"... Aspects of the juvenile law which at its inception made it substantially different from the criminal law are now also present in the criminal law as it exists today in Oregon. Today in the criminal law as well as in the juvenile law the court attempts to find out as much as possible about the individual defendant before making any disposition of the case. In the criminal law as well as the juvenile law the court makes a disposition which is most likely to rehabilitate the individual and permanently remove him from the ranks of crime."

[12] *See In re Gault*, 387 U.S. at 26; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967); REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 665-76, 686-87, 773 (1966).

[13] *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 87 (1967):

"[F]or nearly half the Nation's population there is no detention facility except the county jail, and many of the jails used for children are unsuitable even for adult offenders."

As recent as March 7, 1969, The Washington Post reported on the testimony given by Joseph R. Rowan, former Federal delinquency consultant and now director of the John Howard Association of Illinois, before the juvenile Delinquency Subcommittee of the Senate Judiciary Committee in which Mr. Rowan:

"... emphasized his opinion that treatment of delinquents in institutions for children was no better, and probably more negligent, than in most adult prisons. He called juvenile institutions 'crime hateries' where children are tutored in crime if they are not assaulted by other inmates or the guards first."

His testimony was given stark affirmation by the November 9, 1969 account in The Washington Post which reported on the charges made by the Justice Department that "overseers of an Alabama juvenile

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*United States*, 383 U.S. 541 (1966), the Supreme Court noted that:

> "While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults." 383 U.S. at 555.

However they may be characterized, the truly criminal nature of juvenile court proceedings becomes clear when one considers the consequence of a finding of delinquency on the personal liberty of the child. The importance of the issue of the child's loss of liberty cannot be underestimated. The decision in *Gault* was influenced in large part by the realization, confirmed by objective studies, that "whether it be called punishment or rehabilitation, the juvenile delinquent's confinement is no less a loss of liberty than the

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home 'freely and excessively' administer corporal punishment to 440 Negro youngsters." President Nixon, on November 13, 1969, also called on Attorney General Mitchell to institute a major prison reform drive in America. In a companion statement to his Directive, Mr. Nixon noted "In an appalling number of cases, our correctional institutions are failing." After citing a study indicating approximately a forty percent recidivism rate amongst adult criminals, President Nixon indicated that repeater rates were even greater among persons under twenty, "and there is evidence that our institutions actually compound crime problems by bringing young delinquents into contact with experienced criminals." The Washington Post, November 14, 1969, § A, at 2, col. 3. And on November 22, 1969 Former Justice Fortas speaking before the Juvenile Court Practice Institute in Washington, D.C. specifically attacked the practice of confining juveniles to institutions from which most he said, "emerge as hardened criminals . . . with improved skills as burglars, sex offenders, dope addicts and the like." The Washington Post, November 23, 1969, § A, at 23, col. 1.

adult criminal's."[14] Why, then, should the burden of proof standard necessary to convict a child of a violation of the law be an easier one to meet than the standard applied to a youth who may be only slightly older, if at all, and who is tried as an adult for the same offense?[15]

*A Significant Body Of Respected Judicial Authority Considers The Application Of The Adult Standard To Juvenile Delinquency Determinations A Constitutional Requirement.*

Although most courts continue to classify juvenile proceedings as civil, long ago some courts began noting their essentially criminal nature and the necessity for according the same safeguards to juveniles and adults alike. Until the instant case, the authority in New York was to this effect.[16]

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[14] 37 U. Cin. L. Rev. 851 (1968); *see Gault*, 387 U.S. at 27:

> "The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or a lesser time."

[15] *See* D.C. Code § 11-1553 (1967); Neb. Rev. Stat. § 43-205.04 (1943) and similar provisions in other states under which a juvenile may be waived, at the court's or prosecutor's discretion, to a "criminal" court for trial as an adult. Relatively few procedural steps or substantive standards have ever been delineated for transfer of jurisdiction from a juvenile to an adult criminal court. Ketcham, *What Happened to Whittington?* 37 Geo. Wash. L. Rev. 324, 336 (1968). *See National Council of Juvenile Court Judges, Directory and Manual*, 301-46 (1963). *See also* the discussion of waiver in notes 68-75 and accompanying text, *infra*.

[16] *See In re* Madik, 251 N.Y.S. 765, 767 (Sup. Ct. 1931):

> "The facts, however, of the charge must be proved against the child *in the same way as if the charge were made against an adult;* that is, by competent evidence."
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> * * * *
>
> "In the case of an adult, proof of guilt beyond a reasonable doubt would be required. The district attorney concedes and we think that such proof is required here."

[continued]

In *Jones v. Commonwealth*, 38 S.E.2d 444 (Va. 1946), two boys were charged with a violation similar to breach of the peace. Jones allegedly had thrown a number of rocks and made loud noises in the late hours of the evening. A good deal of the evidence against the defendant was, however, vague and confused in some respects, uncertain in other respects, and contradictory in others.

A Virginia statute stated that:

> ". . . no power is given to the juvenile courts to convict any child of any crime, either misdemeanor or felony or to commit any child to any penal institution. Such court may only adjudge a child delinquent and commit him, not to a penal institution, but to the State Board of Public Welfare, which board is given power to make proper disposition of the child."[17]

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*See also* People v. Fitzgerald, 155 N.E. 584, 587 (N.Y. 1927).

In *In re* James Rich, 86 N.Y.S.2d 308 (Dom. Rel. Ct., Child. Div. 1949), a 15-year-old boy was charged with the fatal stabbing of another boy. In discussing the burden of proof standard, the court remarked:

> "The rule of law is that a charge of crime must be established beyond a reasonable doubt. If there is a reasonable doubt as to the perpetration of the crime, that reasonable doubt must be resolved in favor of the person charged with having committed the act. *It is no less applicable to a child than it is to an adult.* In this case, the doubt I have is only as to the truth that was told; but in the last analysis, it is the result of speculation. And I have no right to speculate." [Emphasis added.] 86 N.Y.S. 2d at 311.

*See also* People v. Anonymous A, B, C and D, 279 N.Y.S.2d 540, 543 (Nassau County Ct. 1967), where the court held that the state had the "burden of proving beyond a reasonable doubt" that a 16-year-old boy had been guilty of stealing an automobile. The opinion in the instant case has repudiated the enlightened approach taken by both courts of first instance in *Madik* and *Anonymous*, as well as by the specialized court in *Rich*.

[17]Virginia Code ch. 78, § 1910 (1942).

Despite this explicit mandate, and while recognizing that the statute dealing with juvenile courts required a liberal construction in order to accomplish its beneficial purposes, the court was not reluctant to admit the basic criminal nature of the boys' trial. Following its flat assertion that a conviction of delinquency requires that "[g]uilt should be proved by evidence which leaves no reasonable doubt," the court added:

> ". . . the trial and punishment of minor offenders follows the regular criminal procedure, modified, in certain respects, by the statutes setting up juvenile and domestic relations courts." 38 S.E.2d at 447, quoting *Mikens v. Commonwealth*, 16 S.E.2d 641, 643 (Va. 1941).[18]

Spurred by *Kent* and *Gault*, several courts have recently acknowledged the basic, fundamental restraint on a youth's liberty affected by an adjudication of delinquency. They have begun to realize that, because of the kind of detention to which a convicted delinquent is subject, the beyond a reasonable doubt standard must be adopted to fully protect the child accused of being a delinquent.

*In re Urbasek*, 232 N.E.2d 716 (Ill. 1967), is an important decision which articulates one state's judicial disposition on the burden of proof standard. In that case, an 11 year old boy had been charged with murder. When the Illinois Court of Appeals first considered the case in 1966,

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[18]For other illustrations of the fact that courts and legislatures recognize the criminal nature of the act which a youth commits, *see, e.g., In re* Whittington, 233 N.E.2d 333, 342 (Ohio 1967) ("Commission of a crime"); N.Y. Family Court Act § 713 (McKinney 1962), para. (a) Committee Comments (juvenile delinquent defined as "one who commits a crime and requires official treatment"); D.C. Code § 3-120 (1967) (Juvenile Court has jurisdiction over "children 17 years of age who shall be convicted of petty crimes or misdemeanors which may be punishable with fine or imprisonment."); Uniform Juvenile Court Act § 2(2) (1968) ("delinquent act" defined as one "designated a crime under the law.") *See also Gault*, 387 U.S. at 49-50.

222 N.E.2d 233 (Ill. Ct. App. 1966), this Court had decided *Kent*, but not *Gault*. The Illinois Court initially ruled that beyond a reasonable doubt was not the proper standard of proof to be applied to juvenile proceedings. On review, however, and in light of the "transcendent spirit" of *Gault*, the Illinois Supreme Court upset the finding that the boy was delinquent.

The court acknowledged that Urbasek had not been denied any of the specific rights which *Gault* had extended to the adjudicatory stage of the juvenile court practice,[19] but held that application of any standard lower than "beyond a reasonable doubt" would dilute the effect of the guarantees which *Gault* assured for juveniles. To do so would not be consonant with due process or equal protection.[20] Moreover, it would not be constitutionally permissible, on a quantum of proof lower than the criminal standard, to subject a child to a loss of liberty equal to or greater than that which might be imposed on an adult for the commission of the same act.[21]

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[19] "While . . . the respondent . . . was denied none of the rights [required, under due process of law, to be applied to juvenile court proceedings after *Gault*], it would seem that the reasons which caused the Supreme Court to import the constitutional requirements of an adversary criminal trial into delinquency hearings logically require that a finding of delinquency for misconduct, which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged." 232 N.E.2d at 719.

[20] *Id.*

[21] "Since the same or even greater curtailment of freedom may attach to a finding of delinquency than results from a criminal conviction, we cannot say that it is constitutionally permissible to deprive the minor of the benefit of the standard of proof distilled by centuries of experience as a safeguard for adults." *Id.* at 719-20. The Illinois Court made clear that adherence to this reasonable doubt standard would not weaken the unique benefits of the Illinois Juvenile Court Act, nor would it require that this standard be applied in cases

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Five other recent state court decisions have specifically dealt with the burden of proof issue. The case of *State v. Santana* involved a 14 year old boy charged with rape. The intermediate Court of Appeals, per its Chief Justice, 431

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alleging a violation of an ordinance (violation leading to a fine), since no "possible loss of liberty for years" might result, as in an adjudication of delinquency. *Id.* at 720. *See In re* Smith, 326 P.2d 835 (Crim. Ct. App. Okla. 1958), in which the court decided that, for purposes of establishing the requisite burden of proof in a determination of delinquency, a child must be accorded *all the safeguards* of a criminal trial where an unfavorable determination may result in detention amounting to "grave" consequences. The clear implication of that holding is that when grave consequences may result from a finding of delinquency the determination must be made on the basis of the beyond a reasonable doubt standard. As in *Smith*, the youth in the instant case faced the possibility of incarceration for a substantial number of years. The court noted at 839: "We are of the opinion rules of procedure in a juvenile proceeding, where the life and liberty of the juvenile delinquent is at stake, should be measured by the gravity of the situation and the exigencies the case may impel. The ordinary rules established and the regular processes provided to produce evidence and to aid the court in testing and weighing it are not to be scrapped because the proceeding is a summary one and findings of facts must not rest upon hearsay. [Citation omitted.] Certainly a juvenile should be subjected to no less protection than an adult. The law throws every safeguard around the rights of an accused adult and his enjoyment of those rights." *See also* People *ex rel.* Rodello v. District Court, Denver County, 436 P.2d 672-76 (Colo. 1968), in which the court remarked that the application of the reasonable doubt standard would not convert a juvenile proceeding into a criminal one. *Cf.* Reed v. Duter, No. 17546 (7th Cir. Sept. 18, 1969), 6 Crim. L. 2081. Although the standard of proof was not in issue the court suggested that "under *Gault*, there can be no constitutionally permissible discrimination between the adult prisoner and the juvenile defendant held in state custody." The Seventh Circuit remarked further that:

> "*Gault* must be construed as incorporating in juvenile court procedures, which may lead to deprivation of liberty, all constitutional safeguards of the Fifth and Sixth Amendments to the Constitution of the United States which apply, by operation of the Fourteenth Amendment, in criminal proceedings."

S.W.2d 558 (Tex. Civ. Ct. App. 1968), held that the Constitution required the state to prove an act of delinquency beyond a reasonable doubt in proceedings which may result in the youth being institutionalized:

> "[T]he underlying reasoning of *Gault* logically requires that a determination of delinquency is valid only when the facts of delinquency are proved beyond a reasonable doubt rather than by a preponderance of the evidence as now required by the present Texas decisions. We believe this is the clear and unmistaken effect of that decision. In so holding, we are in agreement with the interpretation of the *Gault* case by the Supreme Court of Illinois in *In re Urbasek*." 431 S.W.2d at 560.

But the Texas Supreme Court reversed the lower court and retained the civil, preponderance test. 444 S.W.2d 614 (Tex. 1969). After reviewing the split on this precise question in other state and federal courts, and after noting that "[t]he facts in *Gault* were extreme," the court chose to allow the lower standard because "*Gault* does not require that the juvenile trial be adversary and criminal in nature." 444 S.W.2d at 622.

Justice Pope, writing for three dissenters in *Sanatana*, 444 S.W.2d at 623, interpreted *Gault* differently, disagreeing that a lower standard of proof could in any way benefit the youth.

> "A juvenile court, therefore, which works with juveniles at the adjudicatory stage, is at last a court; a court which sits to resolve issues under principles of due process, which is the best method yet devised for fair play . . . .
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> "The real question then is not what is best for Santana; it is whether the reasonable doubt standard in a proceeding of a felony grade which may lead to a deprivation of liberty, is a part of due process . . . .
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> * * * *
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> "Liberty is our real concern. Perhaps no greater harm could come to Santana than the State's misguided efforts to rehabilitate him if, in fact, he is in-

> nocent to begin with. His plea is that he wants fairness first; therapy second. With equal logic, one could have reasoned before *Gault* that the benefits of treatment accorded a juvenile are so helpful and beneficial to the juvenile that the State can be careless in notifying him or his parents about the offense, or providing him a lawyer, or permitting hearsay from an absent complainant, or by tolerating his self incrimination. The rights which *Gault* accords a juvenile reduce the chances for unfairness and injustice. The reason for the reasonable doubt rule is no different." 444 S.W.2d at 628.

A majority of the Supreme Court of Nebraska has ruled in *Debacker v. Brainard*, 161 N.W.2d 508 (Neb. 1968), *prob. juris. noted*, 393 U.S. 1076 (1969), *appeal dismissed*, 38 U.S. Law Week 4001 (1969), that the beyond a reasonable doubt standard is constitutionally required in a juvenile court proceeding.[22] The case involved a 17 year old boy who was charged with the crime of forgery. If the youth had been charged under the general criminal laws, the penalty for the offense would have been imprisonment for between one to twenty years and a fine up to $500.[23] The four judges who felt that the beyond a reasonable doubt standard should be adopted to determine delinquency suggested that:

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[22]Under the holding of the court, four judges were of the opinion that the Act requiring proof by a preponderance of the evidence rather than beyond a reasonable doubt was unconstitutional. Since Nebraska's constitution provides that no legislative enactment may be held unconstitutional except by a concurrence of *five* judges, the lower court's finding of delinquency using the lighter standard was affirmed.

[23]*See* 44 St. John's L. Rev. 101, 109 (1969), which points out the great disparity in confinement periods between that which could result from a conviction of an adult and that which might stem from an unfavorable finding against the 12-year-old boy in the instant case. In this connection see the discussion of waiver at text accompanying notes 68-75 *infra*.

> ". . . a finding of delinquency, for misconduct which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged [citations omitted]. To the extent that those provisions of the Juvenile Court Act incorporating a preponderance of the evidence standard for delinquency proceedings are in conflict, we also believe they are unconstitutional and void." 161 N.W.2d at 513.[24]

While the Ohio Supreme Court has recently refused to hold that the higher standard is required by due process in juvenile proceedings, *In re Agler*, 249 N.E. 2d 808 (Ohio 1969), it did insist that delinquency be proved by "clear and convincing evidence." *Id.* at 816. The Court upset an intermediate state court's opinion which had affirmed the juvenile court's conviction of the youth based on the preponderance standard. *See* 240 N.E. 2d 874, 875 (Ohio Ct. App. 1968).[25] The Supreme Court in *Agler* refused to

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[24]This court dismissed the appeal after having noted probable jurisdiction, on the ground that, since there was no retroactive effect to be given to its decision in Duncan v. Louisiana, 391 U.S. 145 (1968), and Bloom v. Illinois, 391 U.S. 194 (1968), the juvenile "would have had no constitutional right to a trial by jury if he had been tried as an adult in a criminal proceeding" 38 U.S. Law Week at 4001.

[25]The Court of Appeals had emphasized the civil nature of juvenile proceedings. *Id.* at 876-77. *But cf. Rodello, supra,* note 21, where the Court suggested that the adoption of the higher standard would have no effect on the nature of the juvenile proceeding. The Court of Appeals in *Agler* had felt constrained to decide the case in accordance with its state's legal precedent. *See In re* Whittington, 233 N.E. 2d 333 (Ohio Ct. App. 1967). This Court remanded *Whittington* for reconsideration by the state court in light of *Gault. In re* Whittington, 391 U.S. 341 (1968). The Ohio Supreme Court had held (pre-*Gault*, post-*Kent*) that the preponderance standard was to apply because the rehabilitative (versus punitive) goals of juvenile proceedings emphasized the civil nature of such proceedings. Upon reconsideration, the Ohio Court of Appeals did not treat the quantum of proof issue. 245 N.E.2d 364 (Ohio Ct. App. 1969). The dissenting opinion in the Court of Appeal's decision in *Agler* suggested that

(Continued)

accept the classification of juvenile offenders as civil defendants, and rejected the preponderance standard as being constitutionally consistent with, or adequate under, *Gault*.

The court held:

> "[T]he full protection of alleged delinquents empirically demands a broader application of any rule regarding standard of proof. As noted by the *Gault* majority (387 U.S., at 23-25, 87 S. Ct. 1428), long experience has shown that despite commendable efforts to the contrary, the suffering of a judgment of delinquency can have a lasting detrimental effect upon a child's future. This is not to say that the noble experiment has failed, but rather that one of the hopes attendant to its development has not been fully realized. For this reason, we conclude that any determination, of a proper standard of proof in delinquency hearings must

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there may well have been no precedent binding on the court. 240 N.E.2d at 879.

Prior to the Ohio Supreme Court's holding in *Agler* one recent decision seemed to suggest that Ohio might be moving towards the adoption of the higher standard. *See In re* J. R., 242 N.E.2d 604, 605-06, (Juv. Ct. Cuyahoga County, Ohio 1968):

> "Although the quantum of proof necessary for finding of delinquency, at time of the trial and at this writing, is a preponderance of the evidence [citations omitted], the court in this case had evidence in support of the petition that was beyond a reasonable doubt."

*But see In re* Benn, 247 N.E.2d 335 (Ohio Ct. App. 1969). In *Benn*, the intermediate state court noted that it was affirming a case which "exemplifies the fiction which allows the elision from 'crime' to 'delinquency' where a child is involved.... How long the illusion of non-criminality can be maintained under the legerdemain of a Juvenile Code status determination is a matter of some dubiety.... With deference, but reluctance, we conclude that juveniles in this state, whose status is tested on matters criminal in adults, have no right to a jury trial nor to have their condition measured by standards of proof 'beyond a reasonable doubt.' '*The condition of being a boy still spells less procedurally than the condition of being a man in otherwise identical circumstances.*" (Emphasis added.) 247 N.E.2d at 337.

respond to the aspects of both deprivation of a child's liberty and the effect upon his future. . . .

"[W]e conclude that the burden of proof in those juvenile hearings which can result in the child's being adjudged a delinquent, irrespective of disposition, need not be beyond a reasonable doubt, but must be greater than a mere preponderance of the evidence. The standard of proof which lends itself most logically to this view of such proceedings, and which will best preserve the special nature thereof, is that of clear and convincing evidence of the truth of the allegations contained in the complaint." 249 N.E. 2d at 816.

The California Supreme Court also did not follow the leadership provided by the *Urbasek* decision, nor did it even go so far as the Ohio Supreme Court in *Agler*. In *In re M*, 450 P.2d 296 (Cal. 1969), the court considered a case involving a 15-year-old boy who was charged with involuntary manslaughter and who was declared to be a ward of the court. The court (Traynor, C.J., and three other justices concurring; one justice dissenting) held that the 1961 statute adopting the preponderance standard was not "clearly, positively and unmistakably" unconstitutional, 450 P.2d at 305, and constitutional requirements did not demand that delinquency be proved beyond a reasonable doubt. As did the Court of Appeals in *Agler*, the Court felt particularly bound by its earlier decisions.

Unlike the instant case, the evidence in *M* was clear and the boy admitted that he had accidentally shot his girlfriend dead with a gun which had been taken from an automobile which he had previously stolen and abandoned.[26]

The court took a very limited view of *Gault* and indicated that the Supreme Court, in *Gault* had taken "repeated pains

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[26]Under the facts here, where the youth allegedly stole $112 from the complainant's pocketbook, the Family Court judge adopted the statutory "preponderance" standard while admitting that the proof did not satisfy the "beyond a reasonable doubt" standard. *In re* Samuel W. v. Family Court, 299 N.Y.S.2d 414, 423 (1969). *See also In re* Bigesby, 202 A.2d 785, N. 1 (D.C. Ct. App. 1964).

to limit its holding . . . ." 450 P.2d at 299. The California Court concluded that:

> " . . . in the absence of a specific ruling on the issue by the U.S. Supreme Court, we adhere to the pre-*Gault* view of our courts that the established standard is valid and 'No constitutional rights of the appellant have been infringed by the use of the preponderance of the evidence test to determine the truth of the allegation that he had committed a crime.' " *Id.* at 305

In following the *Gault* statement that the juvenile court hearing need not "conform with all of the requirements of a criminal trial or even of the usual administrative hearing" 387 U.S. at 30, the court refused to recognize the essentially criminal nature of juvenile proceeding. It offered the the euphemistic and unrealistic explanation that:

> "Although the consequences of adopting the reasonable doubt standard in juvenile court would perhaps be less drastic than adopting a jury system, to do so would nevertheless introduce a strong tone of criminality into the proceedings. The high degree of certainty required by the reasonable doubt standard is appropriate in adult criminal prosecutions, where a major goal is corrective confinement of the defendant for the protection of society. But even after *Gault*, as we have seen, juvenile proceedings retain a *sui generis* character: although certain basic rules of due process must be observed, the proceedings are nevertheless conducted for the protection and benefit of the youth in question. In such circumstances, factors other than 'moral certainty of guilt' come into play: *e.g.*, the advantages of maintaining a non-criminal atmosphere throughout the hearing, and the need for speedy and individualized rehabilitative services. Indeed, the youth's alleged crime may often be only the latest or most overt symptom of an underlying behavioral or personality disorder which could equally well warrant a declaration of wardship pursuant to other provisions of the code. Thus a determination whether or not the person committed the particular misdeed charged—although the very heart of an adult criminal prosecution—

> may not in fact be critical to the proper disposition of many juvenile cases. On the contrary, in the latter the best interest of youth may well be served by a prompt factual decision at a level short of 'moral certainty.' " 450 P.2d at 302-03.

Judge Peters in dissent responded vigorously to the majority position. He suggested that *Gault*:

> " . . . stands for the proposition that a minor must be afforded the same rights granted a defendant in a criminal case unless there are compelling reasons why such rights should not be granted, and that state decisions and statutes providing to the contrary are violative of the United States Constitution. This fundamental lesson of the *Gault* decision is disregarded by the majority. Certainly the right to a jury trial and the right to insist that guilt be shown beyond a reasonable doubt are fundamental and constitutional rights in a criminal case. This the majority concede. But the majority contend that the determination that the minor shall be a ward of the court is not criminal in nature . . . . Certainly to the minor the proceedings are adversary and criminal in nature. The determination that the minor shall be a ward of the court may result in the confinement of the minor during minority and complete restriction on his freedom of action. Realistically, a proceeding that may result in such confinement and restraint is adversary in nature and criminal in effect. To hold that such a proceeding is not adversary in nature and criminal in effect is to close one's eyes to the realities of the situation, and, as well, is contrary to the teachings of *Gault*." *Id.* at 309

In *State v. Arenas*, 453 P.2d 915 (Ore. 1969) (*en banc*), the Oregon Supreme Court also dealt with the quantum of proof issue in a case involving a 16-year-old boy who was charged with an assault with a dangerous weapon. The Court, though granting that an adult's right to be found guilty beyond a reasonable doubt when he is charged with a crime is one inherent in the Due Process Clause of the Federal and Oregon constitutions, felt particularly restricted

by the state's legislative decision to adopt the preponderance standard.

The Oregon Supreme Court noted that the requisite degree of proof "is closely related to the basic philosophy of juvenile law 'to deal with the child because he needs corrective treatment,' not because he is 'guilty' of a 'crime.' " *Id.* at 918. The court added:

> If the constitution requires that a juvenile cannot come within the jurisdiction of the court unless criminal conduct is proved beyond a reasonable doubt, the great juvenile experiment is over." *Id.* at 919.

Justice O'Connell, dissenting in *Arenas*, noted that:

> " . . . procedure designed to determine whether a child will be incarcerated is essentially criminal procedure. Since the procedure is criminal in nature there is as much reason to require the proof beyond a reasonable doubt in determining the guilt of a child as there is in determining the guilt of an adult."

He added:

> "Although the equal protection clause of the Fourteenth Amendment does not require an across-the-board similarity of criminal procedure for adults and children, that clause does require the child to have the same protection as an adult where the character of the procedure has no relationship to the ends that are served by dealing with a child in accordance with the parens patrial concept when a child is charged with the commission of an act which is a crime if committed by an adult, the question of whether the child committed the act must be resolved by the trier of fact before the trial judge takes over and attempts to apply the theories of juvenile rehabilitation. It seems to me that this preliminary question of guilt should be determined by the same test whether the accused is an adult or a child. . . . Since the relaxation of the burden of proof subjects the child to the risk of incarceration it becomes an integral part of a criminal procedure which, according to the reasoning of *Gault*, must operate to protect the child to the same extent as it would an adult." *Id.* at 921.

The District of Columbia has also refused to relax its restrictive view that a determination of delinquency is not in the nature of a criminal adjudication, and, therefore, does not constitutionally require the adoption of the higher standard of proof in juvenile proceedings. In *In re Ellis*, 253 A.2d 789 (D.C. Ct. App. 1969), the District of Columbia Court of Appeals said:

> "While we have not failed to follow the ruling of *Gault* in those cases where it clearly applies, *Gault* did not decide the question of the quantum of proof required in juvenile cases. We are therefore not persuaded at this time that we should apply the philosophy of *Gault* in order to predict what the Supreme Court might decide if faced with the same question. We are reluctant to condemn or abandon a long standing and useful practice unless the unconstitutionality of that practice is plain and manifest. *Hicks v. District of Columbia*, D.C. App. 197 A.2d 154, 155 (1964)."

> "Concededly there are points of similarity between a juvenile proceeding and a criminal trial. Nonetheless, hearings held before the Juvenile Court remain civil in nature and differ significantly from their criminal counterpart. By statute, the records of juvenile cases are not open to public inspection. Hearings are also closed to the public. Furthermore, a child adjudged delinquent is neither deemed nor treated as a criminal. No civil disabilities are imposed upon him and he is not disqualified from civil service. The purpose and rationale behind such safeguards and, indeed, the very procedure governing treatment of such juveniles is the care, needs and protection of the minor and his rehabilitation and restoration to useful citizenship. *In re Elmore*, D.C. App. 222 A.2d 255, 257, 259 (1966), *reversed and remanded on other grounds*, 127 U.S. App. D.C. 176, 382 F.2d 125 (1967). A flexible approach to juvenile proceedings is the best manner in which to achieve these ends. The safeguards which surround him do not inherently derive from the Constitution but from the social welfare philosophy which

forms the historical background of the Juvenile Court Act." 253 A.2d at 790.[27]

Another recent judicial pronouncement on the burden of proof standard in juvenile proceedings came in a decision rendered by the Fourth Circuit, *United States v. Costanzo*, 395 F.2d 441 (4th Cir. 1968).[28] Although the case dealt with federal juvenile proceedings, the court's language is noteworthy. In dealing with a 17 year old youth who had been charged with illegal interstate transportation of an automobile, the court remarked:

> "Our precise question then is whether for purposes of the required quantum of evidence, no less than for notice, counsel, cross-examination, and the privilege against self-incrimination, a federal juvenile proceeding which may lead to institutional commitment must be regarded as criminal. We hold that it must be so regarded. No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding. *See Gault*, 87 S. Ct. 1428 (1966). The Government's burden in a juvenile case, therefore, is to prove all elements of the offense 'beyond a reasonable doubt,' just as in a prosecution against an adult. We see a compelling similarity between the enumerated safeguards due a juve-

[27] *See In re* Hill, 253 A.2d 791 (D.C. Ct. App. 1969); *In re* Bumphus, 254 A.2d 400 (D.C. Ct. App. 1969); *In re* Wylie, 231 A.2d 81 (D.C. Ct. App. 1967); *In re* Elmore, 222 A.2d 255 (D.C. Ct. App. 1966), *modified*, 382 F.2d 125 (D.C. Cir. 1967); *In re* Bigesby, 202 A.2d 785 (D.C. Ct. App. 1964). The Illinois Supreme Court in *Urbasek* specifically noted that the decisions in *Wylie* and *Bigesby* did not "comport with the recurrent theme of the majority in *Gault*." 232 N.E.2d at 719.

[28] Prior to the decision in *Costanzo* another federal court had before it the question of whether a proceeding under the Federal Juvenile Delinquency Act required proof of guilt beyond a reasonable doubt. *See* Paige v. United States, 394 F.2d 105 (5th Cir. 1968). The court did not decide the question, since it was of the opinion that the proof was not sufficient under either civil or criminal standards. *But* cf. United States v. Essex, 275 F.Supp. 393 (E.D. Tenn. 1967), *rev'd on other grounds*, 407 F.2d 214 (6th Cir. 1969).

> nile in as full measure as an adult and the requirement of proof beyond a reasonable doubt. In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection; and if young and old are entitled to equal treatment in the one respect, we can think of no reason for tolerating an inequality in the other."

After noting that *Jones* and *Urbasek* were in "conformity . . . with the Supreme Court's teachings' in *Gault*, the court continued:

> "For nearly two centuries this higher standard of proof required in criminal cases has been recognized as a basic procedural safeguard and has been adopted by virtually every jurisdiction in this country. *See* IX, Wigmore on Evidence §2497 (3d ed. 1940, Supp. 1964); *see also* McCormick, Evidence §321 (1954). The Supreme Court has termed the Government's obligation to prove every element of the offense beyond a reasonable doubt 'a settled standard of the criminal law.' *Holland v. United States*, 348 U.S. 121, 138 (1954).
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> "In *Brinegar v. United States*, 338 U.S. 160, 174 (1949), the Court observed that, 'Guilt in a criminal cause must be proved beyond a reasonable doubt,' and explained that requirement in *Speiser v. Randall*, 357 U.S. 513, 525-26. It would appear a patent violation of due process and equal protection of the law if a juvenile were found to have committed a crime on less evidence than would be required in the case of an adult, especially since the consequences of the adjudications are essentially the same. *Gault* makes it abundantly clear that 'under our Constitution, the condition of being a boy does not justify a kangaroo court." *In re Gault, supra*, 387 U.S. at 28.
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> "If we had to decide this case on the standard of proof issue tendered by the Government, we would be compelled to reverse, for the diluted measure proposed for juvenile cases is predicated upon a logic the cogency of which has been utterly devastated." (Emphasis added.) (Some citations omitted.) 395 F.2d at 444-45.

Perhaps no judge has more powerfully characterized the restraint imposed on the liberty of an incarcerated juvenile than Judge DeCiantis of the Rhode Island Family Court:

> "The individual liberty of a juvenile is restrained once he is committed to an agency or to the training school. He is supervised, guarded, and punished. He has no choice. He must obey the rules and the orders given to him while he is at the training school. He cannot go home at will. He cannot do what he desires. He is a prisoner just as much as the adult in the state's prison. Not only is he deprived of his liberty, but he is also subject . . . to disciplinary measures accorded to adults and can be subjected to cruel and inhuman punishment, which does exist. * * *
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> "Because the legislature dictates that a child who commits a felony shall be called a delinquent, does not change the nature of the crime. Let's face it, murder is murder; robbery is robbery; they are both criminal offenses, not civil, regardless and independent of the age of the doer. Nothing can change the nature of the act which has been committed.
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> "With respect to the argument that confinement of a delinquent is not punishment, the court would like to point out that committing a boy who has been declared a delinquent to the Training School is not trotting him to Sunday school, to a World Series Game, or his favorite swimming hole. Neither is releasing him from a Training School the same as graduating him from a high school or a junior college. Let's come down to earth and be realistic: the quicker we do, the better it will be for all. Let us not deal with a criminal matter in a civil way, with the result that we have a 'hodge podge' of nothingness.
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> "I am convinced that unless there is a separation of civil process from criminal process, the system of juvenile methods will remain congested with many theories, philosophies and inflated dreams of social-minded reforms, which is detrimental to the juvenile in that it deprives him of his constitutional guarantees and individual liberty. All of the safeguards that are afforded to an adult criminal trial should be, and constitutionally

must be applied to a juvenile case, even including that of the right to trial by a jury of his peers, *as well as a finding of guilt beyond a reasonable doubt, rather than by a preponderance of the evidence.* Then, and only then, will uniformity and due process prevail and the juvenile, the police, the court, and everyone else concerned will know where they are headed." (Emphasis added.) *In re* Rindell, 36 U.S. Law Week 2468 (R.I. Fam. Ct. Jan. 10, 1968).

2. *Legislators, Independent Committees and Commentators Have Recognized That It Is Constitutionally Impermissible to Deny A Youth His Freedom On The Basis Of The Preponderance Standard.*

Legislatures and legislative committees are, like courts, at last beginning to recognize the necessity for a criminal standard of proof in juvenile proceedings. Thus, at least four states have already adopted the reasonable doubt standard, by statute or rule.[29] Moreover, at its 1968 annual conference,[30] the National Conference of Commissioners on Uniform State Laws recommended that all states enact the Uniform Juvenile Court Act[31] which they felt reflects a sound and practical approach in light of *Gault* and *Kent*. The prefatory note to the Act states in part:

> "In both cases [*Gault* and *Kent*] the language of the opinions and the implications contained in them go beyond the specific holdings. They indicate that if the departures in juvenile court from criminal procedures are to be justified when delinquent conduct is alleged involving what for an adult would be a criminal act, the juvenile court proceedings and dispositions must be governed in fact by the objectives of treatment and

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[29] Colo. Rev. Stat. 22-3-6 (Supp. 1967); Md. Ann. Code, Art. 26 § 70-18(a) (Cum. Supp. 1969); New Jersey Court Rules, Rule 9-1(f), effective September 11, 1967; Juvenile Court Rule 4.4(b), as adopted by the Washington Judicial Council, effective January 10, 1969.

[30] Philadelphia, Pa. (July 22-August 1, 1968).

[31] Uniform Juvenile Court Act (1968).

rehabilitation. If the approach is a punitive one, these cases indicate that the procedure must adhere to the constitutional requirements which characterize a criminal proceeding.

"The Uniform Juvenile Court Act has been drawn with a view to fully meeting the mandates of these decisions. At the same time, the aim has been to preserve the basic objectives of the juvenile court system and to promote their achievement. In short, the Act provides for judicial intervention when necessary for the care of deprived children and for the treatment and rehabilitation of delinquent and unruly children, but under defined rules of law and through fair and constitutional procedure."

The Uniform Juvenile Court Act also adopts the beyond a reasonable doubt standard for findings of delinquency:[32]

"If the court finds on proof beyond a reasonable doubt that the child committed the acts by reason of which he is alleged to be delinquent or unruly, it shall proceed immediately or at a postponed hearing to hear evidence as to whether the child is in need of treatment or rehabilitation and to make and file its findings thereon."[33]

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[32]Section 2(2) of the Uniform Act defines a "delinquent act" as one "designated a crime under the law". In *Gault*, this Court specifically noted that, for purposes of the Fifth Amendment privilege against self-incrimination, juvenile delinquency proceedings which may lead to commitment to a state institution are criminal in nature. 387 U.S. at 49-50: "To hold otherwise would be to disregard substance because of the feeble enticement of the civil label-of-convenience which has been attached to juvenile proceedings."

[33]*Id.* at § 29(b). The Comment to this section asserts:

"More is required to sustain a finding of delinquency, unruly conduct or deprivation than a preponderance of evidence. Since the child's liberty or the parent's right to his custody is involved, at least 'clear and convincing evidence' should be required. The Illinois Supreme Court has recently held that implications of the *Gault* case require that proof must be beyond a reasonable doubt to support a finding of delinquency. This section follows the Illinois view in delinquency and unruly cases, but adopts the

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The recently promulgated Guides for Drafting Family and Juvenile Court Acts, adopted by the Children's Bureau of the Department of HEW's Social and Rehabilitation Service, also recommend the use of the criminal standard in determinations of delinquency.[34]

Commentators have also emphasized that a youth is denied a constitutional right when he is adjudged a delinquent by the preponderance standard.[35] Indeed, two recent

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clear and convincing evidence, rule in deprivation cases and in determining the need for treatment or rehabilitation."

*Cf.* Model Rules for Juv. Ct. Rule 26 (Final Draft 1968), drafted by the Council of Judges of the National Council of Crime and Delinquency which did not go so far as to adopt a reasonable doubt standard but did reject the preponderance standard:

> "While the adjudicatory hearing is non-criminal in nature, and therefore is not bound by the reasonable procedure requirement of proof beyond a reasonable doubt, the serious nature of the adjudication demands that the allegations of the petition be proved by more than a mere preponderance of the evidence. The allegations should be demonstrated by clear and convincing evidence, which is the standard used in civil cases for issues of special gravity, such as fraud." Rule 26, Comment.

It was clear that the Council felt reluctant to adopt the reasonable doubt standard only because this Court had not specifically dealt with and ruled in favor of that standard in *Whittington*. *See* Rule 26, Comment:

> "Note. The United States Supreme Court has granted *certiorari* in a case in which the failure of the juvenile court to find a child delinquent 'beyond a reasonable doubt' is assigned as error.... The publication of the Rules will be held up to incorporate the holdings in the *Whittington* case."

*Whittington* is discussed in note 25, *supra*.

[34] Guides for Drafting Family and Juvenile Court Acts, Dept. of Health, Education and Welfare, Social and Rehabilitation Service (Children's Bureau) § 32(c)(1969).

[35] *See, e.g.*, Waite, *How Far Can Court Procedure be Socialized Without Impairing Individual Rights*, 12 J. Crim. L., C.&P.S. 339, 344 (1921); Note, *Juvenile Courts: Applicability of Constitutional Safeguards and Rules of Evidence to Proceedings*, 41 Corn. L.Q. 147, 153 (1955); Rappeport, *Determination of Delinquency in the Juvenile*

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notes on the instant case, in favoring the adoption of the "beyond a reasonable doubt" standard, have respectively suggested that the Court of Appeals' decision had produced a "hiatus in New York's Juvenile Law"[36] and that it would "unfortunately deny the youngster accused of a crime the protections inherent within the Constitution."[37]

These court decisions, state statutes, recommendations and commentators' opinions reflect a significant body of respected authority which recognizes that both policy and the Constitution compel the adoption of the higher standard of proof in order to safeguard the fundamental rights of a youth charged with committing a delinquent act. As *Gault* so vigorously asserted:

> "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[38]

### C. The Stigmatizing Effect of a Conviction In The Juvenile Court Is At Least Equal To That Which Stems From A Conviction In An Adult Criminal Proceeding.

It has always been contended that one of the most beneficial aspects of the juvenile court process was the avoidance of any classification of the youth as a "criminal." For example, in most states specific statutory language supports the benign view that a finding of delinquency is not intended to have the same stigmatizing effect as a criminal conviction:

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*Court. A Suggested Approach*, 1958 Wash. U.L.Q. 123, 149-151; Antieau, *Constitutional Rights in Juvenile Courts*, 46 Corn. L.Q. 387, 412 (1961); 37 U. Cin. L. Rev. 851 (1968); Cohen, *The Standard of Proof in Juvenile Proceedings; Gault Beyond a Reasonable Doubt*, 68 Mich. L. Rev. ___ (1970) (article forthcoming in Jan., 1970 and available upon request).

[36] 44 St. John's L. Rev. 101, 111 (1969).

[37] 20 Syr. L. Rev. 1009, 1013 (1969).

[38] 387 U.S. at 36.

> "No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction. The adjudication and the evidence given in the court shall not operate to disqualify the child in any future civil or military service application or appointment."[39]

But over 20 years ago, the court in *Jones* noted that:

> "The judgment against a youth that he is delinquent is a serious reflection upon his character and habits. *The stain against him is not removed merely because the statute says no judgment in this particular proceeding shall be deemed a conviction for crime or so considered.* The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune, unfortunate moment, rear its ugly head to destroy his opportunity for advancement, and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellow man. Nor is the implication that he has wilfully sworn to a falsehood to prevent a conviction to be disregarded lightly. *Guilt should be proven by evidence which leaves no reasonable doubt.* Inferences must give way when in conflict with facts established by positive proof." (Emphasis added.) 38 S.E. 2d at 447.[40]

Other distinguished American jurists have not failed to comment on this fiction. Few remarks, however, have been so incisive in language or forceful in tone as that of Mr. Justice Musmanno of the Pennsylvania Supreme Court. Dissenting in *In re Holmes*, 109 A.2d 523, 528-29 (Pa. 1954) he cogently noted that the words of the majority (denying that any taint of criminality attached to a finding of delinquency):

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[39]Neb. Rev. Stat. § 43-206.03(5)(1943). *See also, e.g.*, N.J. Stat Ann. § 2A:4-39 (1952); N.Y. Family Ct. Act, §§ 782-784 (McKinney 1963); D.C. Code § 16-2308(d)(1967).

[40]*See* State v. Santana, 444 S.W.2d 614, 624 (Tex. 1969) (dissent).

> " . . . are put together so as to form beautiful language but unfortunately the charitable thought expressed therein does not square with the realities of life. To say that a graduate of a reform school is not to be 'deemed a criminal' is very praiseworthy but this placid bromide commands no authority in the fiercely competitive fields of everyday modern life."

This Court has also recently questioned whether under modern circumstances it is realistic to assert that no taint of criminality attaches to a finding of delinquency. In *Gault*, the Court asserted that it was "disconcerting" that the term "delinquent" had come to have "only slightly less stigma than the term 'criminal applied to adults'."[41]

Supportive of the stigmatizing effect which a conviction of a criminal offense carries with it is some recent data which has been compiled in the District of Columbia. This data makes it abundantly clear that institutionalized "treatment" in a juvenile detention center may have some very negative implications for the juvenile delinquent.

In the District of Columbia, the inspection and use of Juvenile Court records is by law limited to the juvenile, his parents, their duly authorized attorney, institutions or agencies having custody of the juvenile, and other "interested persons, institutions, and agencies by special order of the court;"[42] with violations punishable by a $100 fine or ninety days or both.[43] Juvenile Court rules supplement the District of Columbia Code by allowing other courts in the District of Columbia to see such records upon request.[44] In

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[41] 387 U.S. at 23-24. A noted sociologist and authority in the field of juvenile delinquency has also remarked:

> ". . . delinquency carries a stigma quite comparable to that attached to the criminal status. In many cases the adjudication and other related experiences may be a more severe psychic blow to the child than criminal conviction is to the adult." Tappan, *Crime, Justice and Correction* 392 (1960).

[42] D.C. Code § 11-1586(a)(1967)

[43] D.C. Code § 11-1586(c)(1967)

[44] D.C. Juvenile Ct. Rules, Rule 4B-2(c) (1965, as amended.)

addition, the Board of Commissioners (now Mayor-Commissioner) of the District of Columbia promulgated regulations in 1967 which make the police department's use of juvenile offender records subject to the aforegoing statutory limitations.[45] However, and in spite of the District of Columbia Code's assertion that a juvenile conviction is not a criminal conviction and does not "operate to impose any of the civil disabilities ordinarily imposed by conviction,"[46] juvenile court records (or knowledge thereof) are disclosed in various circumstances which stigmatize the youth.

There are several ways by which juvenile records become available. The most common is waiver by the juvenile himself. For example, the Juvenile Court will release a juvenile record (charges and dispositions) to the military when given a signed authorization by the person whose record is requested.[47] In other cases this waiver occurs with a prospective enlistee is asked to sign an oath concerning his juvenile and adult criminal record.[48]

Juvenile records can also be disclosed by social work agencies referring people for employment. The Offender

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[45] Revisions and Adoption of Recommendations to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia (Oct. 31, 1967). *See also* D.C. Code § 4-134(a) (1967).

[46] D.C. Code § 16-2308(d) (1967).

[47] Interview with Edgar J. Silverman, Director of Social Services, D.C. Juvenile Court, November 5, 1969. Applicants for a license to drive a taxicab in the District of Columbia must list juvenile convictions on the application and sign a waiver form for the juvenile record. Interview with Officer Evans, Hack Inspection Office of the District of Columbia, November 5, 6, 1969.

[48] Interview with Sgt. Sanders, U.S. Army recruiter, November 4, 1969.

Rehabilitation Project,[49] Project Crossroads[50] and Job Corps[51] feel obligated to disclose a youth's criminal record to a prospective employer in order to place him in a job.[52] Interviews with members of these agencies indicated that such disclosure made it difficult to place people with some employers. Employment investigations may also lead to the revelation of juvenile records. Although Federal Employment Form 171 does not require a listing of offenses committed before age 18,[53] investigations for security clearances often reveal an applicant's juvenile conviction in interviews with friends, neighbors, and school authorities.[54]

The Juvenile Court as a matter of course or upon special request releases arrest and disposition information to other government agencies in the District of Columbia. A juvenile's

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[49]Interview with Miss Donna Rowles, Program Developer Offender Rehabilitation Division of the Legal Aid Agency of the District of Columbia, November 7, 1969.

[50]Interview with Mr. Daniel Little, Job Developer, Project Crossroads, District of Columbia, November 4, 7, 1969.

[51]Interview with Miss Susan Best, Job Corps, District of Columbia, November 3, 1969.

[52]Mr. John White of MATESA (Manpower Training and Employment Service Agency, formerly USES) indicated that his agency usually does not inform employers of a person's juvenile arrest or conviction record, although he considers such information in making a job placement. Interview, November 5, 1969. *See also In re* Gault, 387 U.S. at 24-25; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967): "There is evidence that many employers make improper use of [juvenile] records despite the supposed confidentiality that surrounds them."

[53]FEDERAL PERSONNEL MANUAL, ch. 731, § 2.5-2.6.

[54]Interview with Mr. James Evans, Bureau of Training, Civil Service Commission, November 5, 1969.

public school, for example, is routinely sent a record of charges and dispositions against a youth.[55] While there is no specific statutory authorization for such disclosure, it is apparently done pursuant to an "ongoing special order" of the Chief Judge of the Court.[56] Juvenile records are also disclosed to the D.C. Bail Agency, an arm of the adult court which gathers bail information. In practice, if the person does not volunteer his juvenile record, the Bail Agency gets it from the Court.[57] Furthermore, probation officers of the adult courts in the District have unhindered access to juvenile records in preparing their pre-sentence reports.[58]

The actual impact of such disclosures is difficult to measure qualitatively. It may be assumed, however, that mere identification as a juvenile offender will have some detrimental effect on the individual whose record is disclosed.[59] A potential Armed Services enlistee with a juvenile conviction must have his application reviewed by a waiver board. Presently, neither the Navy nor the Air Force will even process an application requiring waiver of an adult or juvenile conviction record,[60] while the Army bars admission to its

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[55]Silverman Interview, note 47 *supra:* Mr. Donald Bennett, Clerk of the Court of the D.C. Juvenile Court indicated that he will disclose a juvenile record to a school only if he "knows the school people and how they will use the information." Interview, October 29, 1969.

[56]If such a special order was ever put in writing, no one had a copy of it. Silverman Interview, note 47 *supra.*

[57]This material is always used in setting release conditions in the adult court. Interview with Mr. Bruce Beaudin, Director, D.C. Bail Agency, November 4, 1969.

[58]Administrative Office of the United States Courts. "The Presentence Investigative Report" Publication No. 103 Division of Probation, at 11.

[59]Rowles, Little, Best, Interviews, notes 49-51 *supra.*

[60]Interviews with Chief Petty Officer Fortier, U.S. Navy and Sgt. Miles, Air Force recruiter, November 4, 1969.

officer programs.[61] Moreover, advancement and security clearances under Civil Service often include an evaluation of a person's juvenile conviction record.[62]

Even the Hack Inspection Office considers the juvenile record in processing taxi cab license applications, though it has been asserted that a record is "not counted for too much."[63] And in the very critical field of education, the Director of Admissions of one reputable university has indicated that "parents should be entitled to know what type of children their children are attending school with" and therefore there is a question about juvenile convictions on its admissions application form.[64] The Director of Admissions also suggested that a youth "in trouble with the police" would not get a recommendation from the high school.[65]

Therefore, despite the fact that a youth is not labelled a "criminal," and despite the fact that statutes suggest that the conviction of a boy for a criminal offense will not impose any of the normal civil disabilities, these recent interviews in the District of Columbia clearly suggest that a youth is subjected to a variety of very subtle, if not direct, biases as he attempts to make his way through the adult world in an honest endeavor to live down his youthful transgressions.

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[61] Interview with Sgt.'s Hughes, and Sanders, Army Recruiting Division, Washington, D.C., November 4, 1969. *See also* Army Regulations, Rule 3-9 (1969).

[62] James Evans Interview, note 54 *supra.*

[63] Officer Evans Interview, note 47 *supra.*

[64] Interview with Mr. Brown, Director of Admissions, Howard University on November 5, 1969.

[65] *Id.*

**D. The Discretionary Authority By Which A Child May Be Transferred To An Adult Court For Trial Under The Reasonable Doubt Standard Constitutes A Denial Of Equal Protection.**

The matter involving Samuel Winship offers a cogent example of the disadvantage at which a juvenile is placed in relation to his adult counterpart. Samuel Winship, a youth of only 12 years of age, was charged with stealing $112 from the complainant's pocketbook. As one recent note on the instant case pointed out:

> "An adult who committed Samuel W.'s offense would have been charged with one of the following crimes: robbery in the third degree; grand larceny in the third degree; or petit larceny. The adult offender, convicted and sentenced by proof beyond a reasonable doubt, could conceivably be released after less than one year imprisonment. A teenager entitled to 'youthful offender' treatment (ages 16 to 19) would enjoy all the protections and guarantees available to the adult, including conviction only upon proof beyond a reasonable doubt and early release. Yet, because Samuel W. was only twelve years old, he was confronted with a period of incarceration ranging up to nine years. Thus, a child subject to the benevolence and safe keeping of the family court, where culpability is assessed by a 'fair preponderance of the evidence,' is actually burdened with a longer sentence than is the 'hardened criminal.' At the very least, such a disposition is illogical."[66] (Citations omitted.)

The loss of Samuel's liberty is, therefore, not an illusory fear.[67]

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[66] 44 St. John's L. Rev. 101, 109 (1969).

[67] In *Gault*, this Court required the application of a variety of procedural safeguards to a 15-year-old boy who had been charged with making lewd telephone calls. In the matter now before this Court, a much younger boy has been charged with a more serious offense that may result in a substantially longer period of detention than was involved in *Gault*.

Compounding the discrimination between adults and juveniles are laws in most jurisdictions which permit the juvenile court (or the prosecutor),[68] at its discretion, to "waive" a youth charged with committing a crime to an adult court for a full-scale criminal trial.[69] The result of such a waiver is to give the waived youth the benefit of the "reasonable doubt" standard, while the nonwaived juvenile may be found guilty on a lower quantum of proof. It should also be noted that the statutes which provide for waiver do not seem to entitle the juvenile to choose to be

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[68] *See, e.g.*, Pritchard v. Downie, 216 F.Supp. 621 (E.D. Ark. 1963), *aff'd*, 326 F.2d 323 (8th Cir. 1964); State v. Brinkley, 189 S.W.2d 314, 333 (Mo. 1945); Fugate v. Ronin, 91 N.W.2d 240 (Neb. 1958); Gerak v. State, 153 N.E. 902 (Ohio Ct. App. 1920):

> "The statutes conferring jurisdiction on the common pleas court have always included the right to try 'whoever' commits a felony, which, of course, includes minors. That court has long exercised such jurisdiction, such statutes have not been specifically amended in this particular, and there can be no question that the common pleas court still has jurisdiction to try minors, as well as adults, who commit felonies, unless the provisions of the Juvenile Court Act limit such jurisdiction. As has been said, that act does not expressly limit such jurisdiction of the common pleas court; neither does it confer such jurisdiction upon any other court."

[69] *See, e.g.*, Lyon v. Commonwealth, 131 S.E.2d 407 (Va. 1963); State v. Van Buren, 150 A.2d 649 (N.J. 1959); State v. Doyal, 286 P.2d 306 (N.M. 1955). Where few criteria for waiver are delineated in the statute, their formulation is a task residing with the juvenile court. *See, e.g.*, Kent v. United States, 383 U.S. 541, 553 (1966). Even when waiver has been accomplished, the court to which the child has been waived may be faced with the difficult task of deciding whether it should conduct the case as one of delinquency, as opposed to one under the general criminal law. *See, e.g.*, United States v. Caviness, 239 F.Supp. 545 (D.D.C. 1965). The onus is on the youth to petition the court for invocation of the delinquency procedures. *See, e.g.*, United States v. Anonymous, 176 F.Supp. 325 (D. D.C. 1959).

waived in order to benefit from the higher standard; the choice is the court's or prosecutor's alone.[70]

Consider, for example, the effect of the present waiver statute in the District of Columbia,[71] allowing the court to waive a 16-18 year old accused of a felony to the United States District Court.

Assume that a 17 year old youth is caught "red-handed" committing a robbery. Further assume that there is at least some question as to the factual issues in the case. Under a preponderance standard, conviction is assured. If proof is required beyond a reasonable doubt, the boy has a chance of being freed. The Juvenile Court judge now has the discretion to decide whether the youth shall be tried according to the higher or lower standard. This constitutes a denial of the equal protection of the laws as between juveniles tried for the same crime in the two different courts.

Nor is such a discrimination mitigated by the fact that the nonwaived juvenile faces a lower maximum penalty than

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[70] *But cf.* State v. Lindsey's Interest, 300 P.2d 491, 494 (Idaho 1956), where a 17 year old was held to have waived treatment as a juvenile delinquent by his assertion of certain constitutional rights and by his "right to be prosecuted under the criminal law."

[71] "§ 11-1553. Waiver of jurisdiction in case of felony and transfer of case. When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is a felony, or when a child under 18 years of age is charged with an offense which if committed by a person 18 years of age or over is punishable by death or life imprisonment, a judge may, after full investigation, waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over; or the other court may exercise the powers conferred upon the Juvenile Court by this chapter and subchapter 1 of chapter 23 of Title 16 in conducting and disposing of such cases." *See* note 15, *supra.*

the waived juvenile.[72] Juveniles may not, any more than adults, be coerced into waiving basic rights because of the fear of increased punishment if they choose to exercise them. This was the clear holding of *Nieves v. United States,* 280 F.Supp. 944 (S.D.N.Y. 1968), involving a juvenile's right to jury trial in the federal courts.

> "The alternatives presented exert strong pressure on any juvenile defendant to waive his Sixth Amendment right. Though he may well prefer to have the trier of facts be a jury of twelve, the cost of such an election is very nearly prohibitive. Such a Hobson's choice is not without parallel in other areas of criminal procedure. In recent years, it has been repeatedly held that procedural alternatives cannot be so structured so as to (1) penalize the assertion of rights guaranteed by the Bill of Rights, or (2) coerce the waiver of those

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[72] *See* Title 22 of D.C. Code (1967); D.C. Code § 24-203 (1967). It may well be that the maximum penalty for conviction in the District Court is less than the period of detention which a youth would face if he were convicted of the crime in the Juvenile Court. For example, the maximum penalty for an adult convicted of an attempted robbery in the District is a fine of $500 and/or three years imprisonment. D.C. Code § 22-2902 (1967). A 16-year-old youth who commits the same crime, however, may be detained until his majority if he is tried in the Juvenile Court. Such situations are not as uncommon as might be thought. In *Gault,* for example, the 15-year-old defendant was convicted of making lewd telephone calls and was sent to a state reformatory until such time as he reached his majority. The penalty for similar misconduct by an adult would have been a fine of $5 to $50 or imprisonment for not more than two months. Indeed, one of the reasons for concern with juvenile proceedings is that commitment can usually extend until the youth reaches the age of 21, and there are few limitations on the power of the judge to impose such a "sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 5 (1967). In the instant case a 12-year-old boy may be confined for up to nine years for stealing $112, while his conviction as an adult (under the reasonable doubt standard) might conceivably result in his release after less than one year.

rights. *See, e.g., Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967); *Garrity v. New Jersey, supra; Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); *United States v. Jackson,* 262 F.Supp. 716 (D. Conn.), *prob. juris. noted* 387 U.S. 929, 87 S. Ct. 2050, 18 L. Ed. 2d 989 (1967).

"These two rules are merely different statements of the following fundamental doctrine: In many cases it is constitutionally impermissible to require an individual to choose between the assertion of a right constitutionally guaranteed and the waiver of that right. Where a reward is held out to an individual for the waiver of a constitutional right, or a greater threat posed for choosing to assert it, any waiver may be said to have been extracted in an impermissible manner. If the individual asserts his right and thereby encounters harsher treatment than he would otherwise, such treatment may be struck down as a penalty. *But see, e.g., Nelson v. County of Los Angeles,* 362 U.S. 1, 80 S. Ct. 527, 4 L. Ed. 2d 494 (1960); *Gardner v. Broderick,* 20 N.Y.2d 227, 282 N.Y.S.2d 487, 229 N.E.2d 184 (1967), *cert. granted,* 390 U.S. 918, 88 S. Ct. 848, 19 L. Ed. 2d 978 (1968) (No. 635); *Laboy v. New Jersey,* 266 F.Supp. 581 (D.N.J. 1967)." 280 F.Supp. at 1000-1001.[73]

This reasoning must apply equally where the juvenile is not even given the choice to begin with, but has it foisted upon him.[74] In short, a State may not set up two tracks

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[73] In *Nieves* the court also rejected the argument that the denial of a jury trial was "balanced" by other advantages of juvenile proceedings. "We doubt that erosion of a defendant's fundamental right can be sanctioned under the rubric of a balancing test." 280 F.Supp. at 1002.

[74] It is arguable that a youth charged with the commission of a crime, who could be waived for a trial to an adult court, should himself have the right to elect to be waived.

[continued]

of criminal procedures for juveniles accused of the same crime with varying degrees of proof necessary to convict and allow judges to choose between them as to individual juveniles. Such a double standard, as it pertains to so vital a matter as the burden of proof, violates the most traditional notions of Equal Protection as the *Nieves* case so

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The question of whether a juvenile should be able to elect to be tried as an adult goes to the very basis of the waiver statute itself. What is the policy of the statute?

On the one hand, it is arguable that the statute is designed to protect society. The judge is to make a determination as to whether the juvenile should be tried as an adult because his conduct is such that he should be treated as a criminal. *Cf.* People v. Yeager, 359 P.2d 261, 270 (Cal. 1961). But this raises significant issues. How can the judge decide that the juvenile should be tried as an adult because of the crime with which he is charged, unless the judge assumes that the juvenile is in fact guilty of committing the acts which he is accused of committing. *See* Green v. United States, 308 F.2d 303, 304 (D.C. Cir. 1962). Exactly what happens at a waiver proceeding is unclear. But it is dubious that the judge considers only the past conduct, independent of the pending charges, in making the waiver determination. The more likely result is that the judge examines the past conduct of the juvenile as revealed by his record and then considers the pending charges as well. *Cf. Yeager,* 359 P.2d at 270, *supra.*

But if this is the case, then the judge is deciding to treat the juvenile as an adult in society's interest. But upon being waived to the adult court, society now offers the juvenile the benefit of all the procedural protections offered criminals. The resulting situation is indeed paradoxical: in society's interest, the judge has decided that the juvenile should be treated as an adult because of his criminal nature. Yet society also offers him greater procedural protection, including the beyond a reasonable doubt burden of proof standard.

This raises the question of whether in operation the waiver statutes does in fact protect the juvenile's interest more than it operates to protect the interest of society. If the statute does so operate, then the juvenile should be able to elect to have that protection. It would appear to frustrate the statute if its operation were otherwise.

well perceived. If, on the other hand, basic due process rights are accorded juveniles in both systems, the State very well may provide for one form of disposition in the adult penal system for one juvenile defendant (based on his past record, potential for rehabilitation, etc.) and retain another in the more lenient juvenile rehabilitation system, even though they have been convicted of the same crime.[75]

## II.

## ADOPTION OF THE REASONABLE DOUBT STANDARD IS ESSENTIAL FOR THE PROTECTION OF A YOUTH'S PRIVILEGE AGAINST SELF-INCRIMINATION

It seems clear that the preponderance test collides with a youth's Fifth Amendment right to remain silent in delinquency proceedings—a right extended to juveniles by *Gault*. The privilege against self-incrimination, in fundamental respects, emphasizes ". . . the principle that persons accused of a crime cannot be made to convict themselves out of their own mouths." *Culombe v. Connecticut*, 367 U.S. 568, 571 (1961).[76] That the right to remain silent is of substantial importance to the youth accused of a crime cannot be doubted. Indeed there are obvious reasons why this right is even more critical to the juvenile than to the adult, who, by virtue of his immaturity and insecurity is more likely to be confused and overwhelmed by the prospect of giving

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[75] *See* Kent v. United States, 383 U.S. 541 (1966).

[76] *See also* Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); The Fifth Amendment reflects "an unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt"; 8 Wigmore, *Evidence* § 317 (McNaughton 1961): The Fifth Amendment embodies the concept of a "fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."

testimony in court than would a hardened criminal. As this Court remarked in *Wilson v. United States:*

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudice against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. 149 U.S. 60, 60 (1893)

The preponderance test is commonly understood to denote simply a relative superiority of evidence in favor of the party on whom rests the burden of proof, and on this basis it is generally held that evidence predominates when it is of "greater weight" or "more convincing" than that offered in opposition.[77] This standard of proof therefore

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[77]*See, e.g.*, Noel v. United Aircraft Corp., 219 F.Supp. 556 (D. Del. 1963) ("greater weight or more convincing"); United States v. Kansas Gas & Elec. Co., 215 F.Supp. 532, 543 (D. Kan. 1963) ("evidence when considered and compared with that opposed to it which has more convincing force and produces . . . a belief that such evidence is more likely true than not true."); Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., 152 F.Supp. 903 (S.D.N.Y. 1957) ("more likely than not" or "more probable than not"); Christensen v. Iowa State Highway Comm'n, 110 N.W.2d 573 (Iowa 1961) ("stronger impression," "more convincing"). *See also* Delaware Coach Co. v. Savage, 81 F.Supp. 293 (D. Del. 1948) ("greater weight"); Smith v. Magnet Cove Barium Corp., 206 S.W.2d 442 (Ark. 1947) ("overbalancing in weight"); Teutrine v. Prudential Ins. Co. of America, 72 N.E.2d 444 (Ill.Ct.App. 1947) (Preponderance exists when the weight of the evidence "inclines" in favor of the party having the burden of persuasion); Edwards v. Mazor Masterpieces, Inc., 295 F.2d 547 (D.C. Cir. 1961) ("reasonable probability").

contemplates the introduction of evidence by both parties in a case.[78]

Although it seems to be recognized that the preponderance test, as applied to the civil defendant, does not require the introduction of any evidence on his behalf in order to succeed on the merits,[79] it nevertheless seems clear that this light standard of proof loses its viability without the balancing concept.

Indeed, many cases recognize that although the number of witnesses presented is not determinative of the sufficiency

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[78]The model instruction employed in the District of Columbia offers a typical illustration of the weighing concept imposed in the preponderance test:

> "Preponderance of the evidence means such evidence as, when weighed against that opposed to it has the more convincing force . . . to establish by a preponderance of the evidence is to move that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has the more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.
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> "If, however, you believe that the evidence on an issue is evenly balanced, then your finding on that issue must be against the party upon whom the burden of proof on that issue rested." (Standardized Jury Instructions for the District of Columbia, at 19.) (Rev. ed., published by D.C. Bar Association).

[79]*See* McCormick, *Evidence* § 319 (1954); Morgan, *Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59, 66 (1933). The instances in which a plaintiff introduces evidence sufficient to go to the jury and the defendant offers no evidence are virtually non-existent. Consequently, there appear to be no cases in which this situation has been judicially analyzed, with the possible exception of White v. Village of Soda Springs, 266 P. 795 (Idaho 1928). And in that case the court, in affirming a judgment for the defendant, construed the defendant's failure to introduce evidence as a demurrer—hardly a desirable posture for the juvenile who wishes to remain silent, since it requires that the evidence be viewed in the light most favorable to the plaintiff.

of the evidence, all other things being equal, (that is, given equally credible witnesses and equally plausible versions offered on either side of a disputed question) the greater number of witnesses should generally prevail over the lesser number.[80] And while it is generally understood that when the evidence is evenly balanced there is no preponderance,[81] this would also suggest that where one party offers some clear evidence and the opposing party presents none, the latter has a good chance of losing. In the case of a youth charged with a crime, the very risk of such a loss has a "chilling" effect on the exercise of a Fifth Amendment right.[82] The loss would not be merely financial, as in the case of a civil defendant—though a loss of or inability to secure employment may well result[83]—but also personal in terms of the deprivation of the youth's liberty.[84]

As we have noted in an earlier part of this brief with regard to a youth's right to the application of the reasonable doubt standard, forcing an accused delinquent to sacrifice the beneficial procedures of juvenile proceedings in order to obtain the higher standard is impermissible since the state may not impose conditions on the grant of constitutional right. Similarly, by choosing to assert his constitutional right to remain silent, the juvenile who may be

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[80] *See, e.g.*, Micheli v. Toye Bros. Yellow Cab Co., 174 So.2d 168 (La.Ct.App. 1965); Caron v. Franke, 121 F.Supp. 958 (W.D.N.Y. 1954). *See also* Williams v. Colonial Pipeline Co., 139 S.E.2d 308 (Ga. 1964).

[81] *See, e.g.*, Zurich Ins. Co. v. Oglesby, 217 F.Supp. 180 (W.D. Va. 1963); Georgia Power Co. v. Smith, 94 S.E.2d 48 (Ga. Ct. App. 1956); Greenberg v. Alter Co., 124 N.W.2d 438 (Iowa 1963).

[82] *Cf.* Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Sanitation Men v. Sanitation Comm'r, 392 U.S. 280 (1968).

[83] *See* text accompanying notes 49-54 *supra.*

[84] The reasons for using the preponderance standard in civil cases are set out in State v. Santana, 444 S.W.2d 614, 626 (Tex. 1969) (dissent).

proven guilty by evidence which demonstrates that it is "more likely" than not that he committed the offense, faces emasculation of that right. Courts have repeatedly said that this kind of Hobson's choice is impermissible. For example, in *Nieves v. United States,*[85] 280 F.Supp. 994 (S.D.N.Y. 1968), a three-judge district court dealt with a case involving a juvenile defendant who was given a choice, under the Federal Juvenile Delinquency Act, 18 U.S.C. § 5033 (1964), between being tried as an adult with a jury trial and being tried as a juvenile without a jury. The court held that the youth had a constitutional right to a jury trial and that it was not constitutionally permissible to present him with an option to waive it in favor of juvenile proceedings. The court asserted that:

> ". . . procedural alternatives cannot be so structured so as to (1) penalize the assertion of rights guaranteed by the Bill of Rights, or (2) coerce the waiver of those rights.
>
> "Where a reward is held out to an individual for the waiver of a constitutional right, or a greater threat posed by choosing to assert it, any waiver may be said to have been extracted in an impermissible manner." 280 F.Supp. at 1000-1001.

In practical terms, there are probably few boys accused of a crime who, in an unwitnessed occurrence or where there are no persons available to confirm their alibi, would not feel pressured to take the stand to rebutt the evidence offered by the government. For the government's position may be far from convincing when it need only demonstrate that it is "more probable" than not that the youth committed the crime.[86] When a boy's liberty is at sake, he is,

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[85] *Cf.* United States v. Jackson, 390 U.S. 570 (1968).

[86] "What those who have laid down the principle that 'preponderance' of evidence will justify and require a decision confirmable with it, have failed to realize, is that perception of the

(continued)

therefore, compelled to forgo a constitutional right in the hope that he will not be convicted on a meager amount of evidence which may subject him to a prolonged period of institutional atrocity and subsequent societal ostracism.

## III.

## ADOPTION OF THE REASONABLE DOUBT STANDARD WILL AID THE JUVENILE COURT SYSTEM IN ACHIEVING ITS LAUDATORY GOALS BY CONCENTRATING THE APPLICATION OF ITS RESOURCES ON YOUTHS WHO MOST NEED REHABILITATION.

Even if it is correct that juvenile detention provides effective rehabilitation, and even if it is true that the status of being adjudicated a delinquent does not tarnish the image of a youth, there is no basis for asserting that affording procedural safeguards to a youth will prevent a juvenile court from achieving its benevolent goals. Indeed, in specifically dealing with the dispositional stage of juvenile proceedings "by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institutuion," 387 U.S. at 13, this Court noted in *Gault*:

> "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not

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preponderance of evidence is quite consistent with want of belief. Of two pieces of very weak evidence, one may preponderate. It might be barely enough to convince, had it not encountered the contradictory evidence. Opposed by the latter, it may be sufficient to generate even the lowest degree of belief. To detect a preponderance of evidence . . . is neither to believe . . . nor to be logically required to believe . . . . It would be fatuous to affirm that a man ought to believe, even faintly, everything the evidence for which is, in his opinion, stronger than the evidence against it." Trickett, *Preponderance of Evidence and Reasonable Doubt* (The Forum, Dickinson School of Law, X, 76, 1906), cited in 9 Wigmore, *Evidence* § 2498 (Supp. 1964).

> feel that he is being fairly treated and may therefore resist the rehabilitative efforts of Court personnel." *Id.* at 26.

This Court repeatedly emphasized in *Gault* that by extending certain rights to juveniles at the dispositional stage of a delinquency hearing it was in no way interfering with the "commendable principles relating to the processing and treatment of juveniles separately from adults." *Id.* at 22. The Court appropriately noted that the incentive for twentieth-century reform in legislation relating to juvenile offenders had come from men who were terribly disturbed by the adverse effects which fell upon young people who were confined to state prisons along with hardened adult criminals.[87] Guaranteeing certain safeguards to the juvenile during the hearing state of the court process would in no way prevent the effective rehabilitation of the youth subsequent to any determination of his involvement in the offense. The discretion afforded juvenile court in prescribing treatment for juveniles is left unaffected by a grant of constitutional protections. As the dissent noted in *Santana, supra:*

> "Santana is located at the same stage as was *Gault*, at the adjudicatory stage, with a felony charged, which resulted in the loss of liberty by commitment to an institution. We are not, therefore, concerned with any limitations upon care, counseling, treatment, rehabilitation, or other beneficences which he might have received and during some period of the [intake or disposition] stages. Our concern is not with juvenile philosophy generally. Our concern is whether Santana has, in fact, been judicially found to be a delinquent according to due process. He declares he is innocent of the charge of delinquency; and upon principles of justice, fairness, and equal treatment that others receive when charged

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[87] *See* Parker, *Some Historical Observations on the Juvenile Court*, 9 Crim. L.Q. 467, 476 (1967). Despite the objectives of these reforms the effectiveness of rehabilitation in juvenile institutions has been seriously questioned. *See* note 13 *supra* and accompanying text.

with rape, that he neither needs nor deserves the States' benevolence.

To hold that an act of the Legislature settles this case because it says that juvenile misconduct is a civil or a non-criminal proceeding is too easy an answer. *Gault* faced this issue squarely, and held that labels one way or the other were inconclusive. It did not jettison the juvenile philosophy of treatment and rehabilitation. It recognized that there is room for the benefits of juvenile procedures which classify as non-criminal a juvenile who is adjudged delinquent. The court expressly emphasized that a delinquency adjudication did not operate as a civil disability or disqualify him for civil service appointment. Following those statements, the court said, '*There is no reason why the application of due process requirements should interfere with such provisions.*' (Emphasis added). 444 S.W. 2d at 624.[88]

We have suggested that the adoption of the criminal standard of proof in juvenile delinquency determinations will in no way denigrate the usefulness of the post-adjudicatory rehabilitative process. Perhaps more importantly, it should be emphasized that the continued application of the preponderance standard has a detrimental effect on the quality of treatment which may be given to those convicted juveniles who really need it. We offer the District of Columbia as an example.

The District of Columbia Juvenile Court is suffering from an unprecedented increase in referrals.[89] It takes close to a

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[88]One justification often given for the application of the lower standard in juvenile proceedings is that the confinement of convicted delinquents is rehabilitative in nature, while incarceration of adult criminals is not. While rehabilitation is not given the priority it allegedly has in juvenile court, it nevertheless remains as one significant purpose and goal of the law for all convicted offenders. *See* Michael & Weschler, *Criminal Law and Its Administration* 11, 17 (1940). *See also* note 11, *supra.*

[89]6875 juvenile cases in fiscal 1969. See Annual Report of the Juvenile Court, at 21 (1969) (hereafter referred to as "Annual Report.")

year to bring a juvenile to trial, and in cases of jury trials, substantially longer. A higher standard of proof in criminal cases would affect this by increasing the number of dismissals, decreasing the number of cases originally pending, and increasing the number of pleas to reduced charges.

With the exception of intake screening, the Juvenile Court's Social Services–preparing disposition recommendations and providing supervision for probationers–come into play only after adjudication.[90] At the end of fiscal 1969, the Court's social staff of 31 persons was supervising 1442 children on probation, and preparing an additional 321 social studies for children adjudicated but not yet disposed of. The average case load per worker was 57.[91]

Referring to the rehabilitative resources available to convicted juveniles who have been committed to custody, the District of Columbia Juvenile Court's 1969 Report noted: "[O]ne of the most urgent problems confronting the Court is the limited dispositional resources available to it."[92] For example, the Juvenile Court provides totally inadequate resources for drug-addicted juveniles and for emotionally disturbed children; it has only one Youth Probation House capable of housing 15 probationers without a suitable home; and those youths committed to the Department of Public Welfare Children's Center find outdated programs and an undermanned staff.[93]

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[90] Annual Report at 7. In the Annual Report the court emphasized the need for more judges, due to a "severe backlog of cases and a serious delay in processing them." *Id.* at 17. It also cited the need for more probation workers, pointing out that the present case loads are "too high–almost double the standard case load recommended by national standard-setting agencies–to allow the necessary time to make probation a meaningful experience for the juvenile." *Id.* at 18.

[91] *Id.* at 8.

[92] *Id.* at 19.

[93] *Id.* at 19-20.

The recidivism rates of juveniles also pointed out the ineffectiveness of the rehabilitative treatment they receive. In 1966 the President's Crime Commission Report on the District of Columbia showed a 42 percent recidivism rate within six months after institutional release.[94] The court's most recent figures show that 33 percent of juvenile law offenders referred to court have already been adjudicated on a previous occasion.[95] Of the 1327 juvenile repeaters, 575 were currently on probation (43 percent), 289 under the supervision of the Department of Public Welfare following institutionalization (22 percent), and 261 (20 percent) awaiting action of the court on a prior referral.[96]

These statistics merely illustrate one jurisdiction's difficulties. They indicate that juveniles are receiving inadequate treatment as a result of meagre resources available to the courts and the community. These same resources can provide the necessary processing and rehabilitation only if the number of juveniles which must be accommodated to the system is small. It would be a far better use of these resources to limit them to youths who clearly—and by the same due process standards as adults—need them.

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[94] Report of the President's Commission on Crime in the District of Columbia 709 (1966).

[95] Annual Report at 28.

[96] *Id.* at 41.

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the New York Court of Appeals, and hold that a youth convicted of a criminal offense is denied his Constitutional rights unless he is proved guilty beyond a reasonable doubt.

Respectfully submitted,

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